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No. 90-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LOCAL NO. 1777,
Petitioner,

v.

FANSTEEL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR FANSTEEL, INC., IN OPPOSITION

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QUESTION PRESENTED

Whether a party to a collective bargaining agreement waives its right to contest the arbitrability of a grievance by proceeding to arbitration while challenging the arbitrator's jurisdiction and expressly reserving the issue for subsequent judicial determination?

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APPLICABLE REGULATIONS

Federal Mediation and Conciliation Service, Arbitration Services Regulations, 29 CFR § 1404.14, Conduct of Hearings.

> All proceedings conducted by the arbitrator shall be in conformity with the contractual obligations of the parties. The arbitrator is also expected to conduct all proceedings in conformity with § 1404.4(b). The conduct of the arbitration proceedings is under the arbitrator's jurisdiction and control and the

> arbitrator's decision is to be based upon the evidence and testimony presented at the hearing or otherwise incorporated in the record of the proceeding. The arbitrator may, unless prohibited by law, proceed in the absence of any party who, after due notice, fails to be present or to obtain a postponement. An award rendered in an ex parte proceeding of this nature must be based upon evidence presented to the arbitrator.

STATEMENT

The Union, Petitioner, filed a grievance against the Company raising two issues: retention of permanent replacement employees after a strike and supervisors allegedly performing bargaining unit work. (Pet. App. A, p. 4.) As the court of appeals, district court, and arbitrator all found, the Company opened the arbitration hearing by stating and reserving its objection to the arbitrability of the issue dealing with retention of permanent replacements. (Pet. App. A, pp. 5-6; Pet. App. B, pp. 6-7; Pet. App. C, p. 27.)

After the hearing, the arbitrator concluded that the issue was arbitrable and sustained the Union's grievance. The Company filed a petition in district court seeking to vacate the portion of the award concerning retention of strike replacements. The district court granted the Company's petition, finding that the Company had reserved its objection to arbitrability and that the parties had "clearly contracted to exclude from arbitration the very dispute that t[he] Union ha[d] tendered to the Arbitrator." (Pet. App. B, p. 21.)

On appeal, the Union argued that the Company waived its arbitrability objection and consented to arbitration of the Union's grievance. The court of appeals rejected this contention, finding that the Company's explicit reservation of its right to challenge arbitrability comported with the court's decision in *Jones Dairy Farm v. Local No.*

P-1236, United Food and Commercial Workers International Union, 760 F.2d 173, 175, 176 (7th Cir. 1985) (Posner, J.), as well as with precedent and the views of commentators.[1]

The court also concluded that allowing a party to arbitrate an issue while reserving the right to challenge its arbitrability "reflects wise public policy." (Pet. App. A, p. 8.) As the court stated,

> . . . permitting an arbitrator to attempt to address a dispute prior to a judicial arbitrability determination, . . . may well [allow the parties] to resolve their disputes without requiring the involvement of the judiciary. Furthermore, . . . upholding . . . the process does not discriminate in favor of the party who submits to arbitration of a grievance that it did not initiate subject to a later judicial arbitrability challenge. The party initiating arbitration has made a decision that the dispute is arbitrable when it initiates an arbitration proceeding. If that party felt the dispute was not arbitrable, it would have chosen a forum other than arbitration. Thus, permission for the non-initiating party to preserve arbitrability objections following the arbitration hearing merely permits the non-initiating party to make the same decision concerning arbitrability that the initiating party made prior to submission of the decision to arbitrate and does not discriminate against the initiating party. Indeed, such a rule

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[1] *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372 (3d Cir. 1981); *R.W. Granger & Sons, Inc. v. Eastern Massachusetts Carpenters and Carpenters Local 275 of the United Brotherhood of Carpenters and Joiners of America*, 686 F. Supp. 22 (D. Mass. 1988); *Northwest Airlines, Inc. v. International Association of Machinists and Aerospace Workers Air Transport District Lodge No. 143*, 1988 U.S. Dist. Lexis 14198 (D. Minn. 1988). The court of appeals also cited Elkouri & Elkouri, *How Arbitration Works* 220-21 (4th ed. 1985) and Fairweather, *Practice and Procedure in Labor Arbitration* 132 (2d ed. 1983), as supporting its view.

> frequently is beneficial to the party who initiated arbitration in allowing that party access to the arbitral process without the necessity of the filing of a lawsuit to compel arbitration.

(Pet. App. A, pp. 8-9.)

The court of appeals therefore affirmed the district court's conclusion that the Company had validly preserved its right to challenge the arbitrability of the Union's grievance concerning permanent replacements. The court of appeals also upheld the district court's finding that the issue was not arbitrable and affirmed the vacation of the award.

The Union's petition for a writ of certiorari challenges the court of appeals' determination that the Company did not waive the right to contest the arbitrability of the strike replacements issue by participating in the arbitration proceeding under protest. The Union's position is founded on the theory that despite its stated challenge to arbitrability and reservation of the right to pursue that challenge in subsequent judicial proceedings, the Company waived any right to challenge the grievance's arbitrability simply by participating in the arbitration proceeding.

SUMMARY OF ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or another court of appeals. It is consistent with federal labor policy to minimize judicial involvement with arbitration.

ARGUMENT

1. There is no conflict of authority on the issue presented in this case. The Union has not cited a single case standing for the proposition that a party cannot participate in an arbitration proceeding while preserving an objection to arbitrability for subsequent independent judicial determination under the standard set forth in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986). All of the cases cited by the Union consider either (1) the appropriate standard of judicial review of a challenge to an arbitrator's decision on the merits or (2) the effect of submission to arbitration without reserving challenges to arbitrability. The court of appeals and district court committed no error when they found that the authorities uniformly hold that a party may effectively preserve its objection to arbitrability by submitting to arbitration under protest. (Pet. App. A, p. 8; Pet. App. B, pp. 11-12.)[2]

2. The Union's petition appears to challenge the facts found by the courts below. The Union contends that "[t]he Seventh Circuit completely ignored [the Company's] express submission of the arbitrability dispute to the arbitrator" and that the Company "voluntar[ily]"

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[2] In addition to the cases cited by the court of appeals, other holdings to the same effect include *Avis Rent a Car System, Inc. v. Garage Employees Union, Local 272*, 791 F.2d 22, 26 (2nd Cir. 1986); *Dreis & Krump Manufacturing Co. v. International Association of Machinists & Aerospace Workers District No. 8*, 802 F.2d 247, 251-2 (7th Cir. 1986); *Teamsters Local Union No. 764 v. J.H. Merritt and Co.*, 770 F.2d 40, 43 (3d Cir. 1985); *George Day Construction Co., Inc. v. United Brotherhood of Carpenters & Joiners of America, Local 354*, 722 F.2d 1471, 1475, 1476 (9th Cir. 1984); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980); *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 117 v. Washington Employers, Inc.*, 557 F.2d 1345, 1349-50 (9th Cir. 1977); *Local 719, American Bakery & Confectionary Workers v. National Biscuit Co.*, 378 F.2d 918 (3d Cir. 1967).

submitted the matter to the arbitrator. (Pet. Br. 10.) If this is an assertion that the court of appeals erred in not overturning the district court's factual findings, it fails to raise an argument worthy of this Court's attention. See *Rules of the Supreme Court of the United States*, Rule 10.

Moreover, Petitioner's characterization of the court of appeals' decision is plainly incorrect. Contrary to Petitioner's assertion, the court of appeals did consider the nature of the Company's submission to the arbitrator and found that the Company "explicitly reserved its objection to arbitrability . . . ." (Pet. App. A, pp. 7-8.)

3. Finally, the decision by the court of appeals is consistent with sound public policy. It allows the parties the opportunity to resolve their labor disputes through arbitration without requiring the intervention of the judiciary. The arbitration hearing develops the record, illuminates the strengths and weaknesses of each party's position, and permits the parties to fully consider resolving the case by settlement or acceptance of the arbitrator's decision. In the event arbitrability is challenged in subsequent litigation, the arbitration proceeding conserves judicial resources by creating a record and defining the issues, thus permitting a more efficient review.

Implicit in the Union's argument is the view that the only proper way for an employer to present an arbitrability question to a court is to refuse to submit to arbitration, force the union to file a petition to compel arbitration, and thus secure a pre-arbitration determination of arbitrability. This view ignores the fact that the rules of both the American Arbitration Association and the Federal Mediation and Conciliation Service permit arbitration cases to proceed in a party's absence.[3]

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[3] American Arbitration Association, Voluntary Labor Arbitration Rules (January 1, 1988), Rule 12; Federal Mediation and Conciliation Service, Arbitration Services Regulations, 29 CFR § 1401.14.

Under these rules, a union can elect to move forward with arbitration rather than sue to compel arbitration, leaving the employer with only two choices: submit to arbitration under protest or seek to enjoin the arbitration. Of these two choices, submission to arbitration under protest is clearly preferable. Indeed, the availability of an injunction against an arbitration hearing is questionable. *In re District No. 1—Pacific Coast District, Marine Engineers' Beneficial Assn.*, 723 F.2d 70 (D.C. Cir. 1983) (Norris-LaGuardia Act deprives court of jurisdiction to enjoin labor arbitration).

Considering the prospect of *ex parte* arbitrations and the questionable availability (and desirability) of injunctions against arbitration, a party must, as a practical necessity, be given the opportunity to participate in an arbitration proceeding while preserving its objections to arbitrability.

CONCLUSION

For the foregoing reasons, the Company respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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